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4 J&J SPORTS PRODUCTIONS, INC.,
5 Plaintiff,
6 v.
7 MICHAEL D. PARAYNO,
8 Defendant.
9

10 Case No. [11-cv-05424-JST](#)
11

**12 ORDER GRANTING MOTION FOR
13 SUMMARY JUDGMENT**

14 Re: ECF No. 34
15

16 In this action for violations of the Federal Communications Act and related claims,
17 Plaintiff J&J Sports moves for summary judgment. Defendant Parayno has not filed an opposition
18 or a statement of non-opposition as required by Civil Local Rule 7-3. For the reasons set forth
19 below, the motion is GRANTED.
20

21 I. BACKGROUND

22 A. The Parties and Claims

23 This action arises out of Defendant Parayno's unauthorized exhibition of a boxing match
24 titled *Tactical Warfare: Manny Pacquiano v. Antonio Margarito, WBC Light Middleweight*
25 *Championship Fight Program* ("the Program"), at the Berkeley Birdland Jazz ("the
establishment") on November 13, 2010. Compl. ¶¶ 7, 9, 12, ECF No. 1.

26 J&J Sports brings four claims against Parayno arising out of the alleged interception and
27 exhibition of the Program: (1) violations of 47 U.S.C. § 605; (2) violations of 47 U.S.C. § 553; (3)
28 conversion under California law; and (4) violations of California's Business and Professions Code
Section 17200.

B. Undisputed Facts

J&J Sports owns the exclusive nationwide rights to distribute the Program to commercial
entities. Gagliardi Decl. ¶¶ 1-3, ECF No. 34, Ex. 3. J&J Sports sells licenses to commercial

1 entities in California, which permit the entities to exhibit the Program in their commercial
2 establishments. Id.

3 On November 13, 2010, investigator Mark C. Gerstle observed the unlawful exhibition of
4 the Program at the Berkeley Birdland Jazz between 7:30 p.m. and 7:58 p.m. Gerstle paid a cover
5 charge of \$20 to enter the establishment. The Program was displayed on both a large projection
6 screen and a smaller 25" television to approximately 25 to 39 patrons. The establishment can
7 accommodate a total of 50 patrons. Gerstle Decl. at 1-2, ECF No. 34-2.

8 Parayno, an owner and manager of the Birdland Jazz, willfully intercepted and broadcast
9 the Program at the establishment for his financial gain without paying a licensing fee to J&J
10 Sports. Request for Admission ("RFA") at 1-3, Riley Decl., Ex. A, ECF No. 34-1.¹ Parayno
11 advertised that the event would be shown at the establishment. Id. at 3. He received the Program
12 via satellite. Id. at 5.

13 **C. Jurisdiction**

14 The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1367.

15 **II. LEGAL STANDARD**

16 Summary judgment is proper when a "movant shows that there is no genuine dispute as to
17 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
18 "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by"
19 citing to depositions, documents, affidavits, or other materials. Fed. R. Civ. P. 56(c)(1)(A). A
20 party also may show that such materials "do not establish the absence or presence of a genuine
21 dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R.
22 Civ. P. 56(c)(1)(B). An issue is "genuine" only if there is sufficient evidence for a reasonable
23 fact-finder to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-

24
25 ¹ J&J Sports served requests for admission on Parayno on December 13, 2012, but Parayno never
26 responded to the requests. Riley Decl. ¶¶ 3-4. Accordingly, the matters in the requests are
27 deemed admitted. See Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, within 30 days after
28 being served, the party to whom the request is directed serves on the requesting party a written
answer or objection addressed to the matter and signed by the party or its attorney."); see also
Conlon v. United States, 474 F.3d 616, 621 (9th Cir. 2007) ("Unanswered requests for admissions
may be relied on as the basis for granting summary judgment.").

1 49 (1986). A fact is “material” if the fact may affect the outcome of the case. Id. at 248. “In
2 considering a motion for summary judgment, the court may not weigh the evidence or make
3 credibility determinations, and is required to draw all inferences in a light most favorable to the
4 non-moving party.” Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

5 Where the party moving for summary judgment would bear the burden of proof at trial,
6 that party bears the initial burden of producing evidence that would entitle it to a directed verdict if
7 uncontroverted at trial. See C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474,
8 480 (9th Cir. 2000). If the moving party satisfies its initial burden of production, then the non-
9 moving party must produce admissible evidence to show that a genuine issue of material fact
10 exists. See Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).
11 The non-moving party must “identify with reasonable particularity the evidence that precludes
12 summary judgment.” Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996). Indeed, it is not the
13 duty of the district court to “to scour the record in search of a genuine issue of triable fact.” Id.
14 “A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for
15 summary judgment; rather, the nonmoving party must introduce some significant probative
16 evidence tending to support the complaint.” Summers v. Teichert & Son, Inc., 127 F.3d 1150,
17 1152 (9th Cir. 1997) (citation and internal quotation marks omitted). If the non-moving party fails
18 to make this showing, the moving party is entitled to judgment as a matter of law. Celotex Corp.
19 v. Catrett, 477 U.S. 317, 323 (1986).

20 **III. DISCUSSION**

21 J&J Sports moves for summary judgment on its claim under 47 U.S.C. § 605 and its claim
22 for conversion under California law. Parayno has not filed an opposition or a statement of non-
23 opposition as required by Civil Local Rule 7-3. While the Court may not grant J&J Sports’
24 motion on the basis that it is unopposed, the Court may grant the motion if J&J Sports’
25 submissions are sufficient to support the motion and do not reveal a genuine issue of material fact.
26 See Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir. 1993).

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1 **A. Title 47 U.S.C. § 605**2 **1. Liability**

3 The Federal Communications Act prohibits the unauthorized publication or use of radio
4 communications. Cal. Satellite Sys. v. Seimon, 767 F.2d 1364, 1366 (9th Cir. 1985). Protected
5 radio communications include satellite broadcasts. See DirecTV, Inc. v. Webb, 545 F.3d 837, 844
6 (9th Cir. 2008) (holding that it “is clear from the case law since the 1984 amendments that the
7 ‘communications’ protected by § 605(a) include satellite television signals”) (citations omitted).

8 Section 605 of the Act provides in part:

9 No person not being authorized by the sender shall intercept any radio
10 communication and divulge or publish the existence, contents, substance, purport,
11 effect or meaning of such intercepted communication to any person. No person not
12 being entitled thereto shall receive or assist in receiving any interstate or foreign
13 communication (or any information therein contained) for his own benefit or for
14 the benefit of another not entitled thereto.

15 47 U.S.C. § 605(a).

16 An aggrieved person may bring a civil action under Section 605 in district court and may
17 elect to recover either statutory or actual damages. See 47 U.S.C. § 605(e)(3). An aggrieved
18 person “shall include any person with proprietary rights in the intercepted communication by wire
19 or radio[.]” 47 U.S.C. § 605(d)(6).

20 Liability under 47 U.S.C. § 605 requires proof that defendant has “(1) intercepted or aided
21 the interception of, and (2) divulged or published, or aided the divulging or publishing of, a
22 communication by the plaintiff.” Cal. Satellite, 767 F.2d at 1366 (citation omitted).

23 Here, the undisputed facts show that J&J Sports owns the exclusive rights to distribute the
24 Program and that Parayno willfully intercepted the Program via satellite without first paying a
25 license to J&J Sports. Gagliardi Decl. ¶ 3; RFA at 1-5, Riley Decl., Ex. A. The undisputed facts
26 also show that Parayno exhibited the Program to patrons of the establishment. RFA at 1-5, Riley
27 Decl., Ex. A. These undisputed facts are sufficient to entitle J&J Sports to summary judgment on
28 its claim under Section 605. Accordingly, J&J Sports’ motion for summary judgment on its
Section 605 claim is GRANTED.

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1 **2. Damages**2 **a. Statutory Damages**

3 An aggrieved party may seek to recover either actual or statutory damages under Section
4 605. 47 U.S.C. § 605(e)(3)(C). Here, J&J Sports requests \$10,000 in statutory damages, the
5 maximum award possible, on the basis that it would be “impossible” to calculate actual damages.²
6 Mot. at 11, ECF No. 34.

7 An aggrieved party may recover not less than \$1,000 and not more than \$10,000, “as the
8 court considers just,” for each violation of Section 605(a). 47 U.S.C. § 605(e)(3)(C)(i)(II). The
9 Ninth Circuit has not provided guidance to district courts as to how to calculate statutory damages
10 under Section 605. Courts in this district, however, routinely take into account several factors
11 when calculating statutory damages under Section 605, such the establishment’s maximum
12 capacity, the number of patrons present during the exhibition of the program, the number of
13 televisions on which the program was exhibited, whether the defendant is a repeat offender,³ and
14 evidence of financial gain. When the program is shown to a small audience and there is no
15 evidence of promotional activity, courts in this district typically award minimal statutory damages.
16 See, e.g., Kingvision Pay-Per-View, Ltd. v Backman, 102 F. Supp. 2d 1196, 1198 (N.D. Cal.
17 2000) (awarding \$1,000 in statutory damages where there were sixteen patrons in a bar and no
18 cover charge was imposed and there was no evidence of other promotional activity).

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² At a hearing in another case – J&J Sports has a lot of cases – counsel for J&J Sports confirmed
21 that it seeks the maximum award of damages in every case. It is hard to imagine a less persuasive
22 strategy. Congress presumably established the maximum award to provide redress for the very
23 worst violations of the statute, and by definition not *every* defendant in J&J Sports’ cases can be
24 the worst violator – even with respect to each other, much less all other violator in the federal
25 courts.

26 ³ J&J Sports submitted evidence showing that Parayno is a repeat offender, but the cases cited by
27 J&J Sports were all filed after this one. See Mot. at 16; see also J&J Sports Productions, Inc. v.
28 Parayno, Case No. 3:12-cv-02223 SI (judgment entered against Parayno in the amount of \$5,200);
 J&J Sports Productions, Inc. v. Parayno, Case No. 3:12-cv-4790 TEH (judgment entered against
 Parayno in the amount of \$4,200); J&J Sports Productions, Inc. v. Parayno, Case No. 4:12-cv-
 01704 PJH (judgment entered against Parayno in the amount of \$5,200). For this reason, Court
 does not take into account the judgments entered in those cases. J&J Sports was free, of course, to
 cite Parayno’s conduct in this case as prior conduct when it argued for relief in those subsequent
 cases.

1 Here, the undisputed facts show that the maximum capacity of the establishment was 50
2 patrons; that between 24 and 39 patrons were at the establishment at the time of the exhibition at
3 issue; that the Program was shown on both a projector and a 25" television; that patrons paid a \$20
4 cover charge to enter the establishment; that Parayno advertised the Program prior to exhibiting it,
5 and that the license fee paid to J&J Sports by establishments to lawfully broadcast the program
6 was \$2,200. Gerstle Decl. at 1-2, ECF No. 34-2; RFA at 1-5, Riley Decl., Ex. A, ECF No. 34-1;
7 Gagliardi Decl., Exh. 2, ECF No. 34-3.

8 In light of this evidence, the Court concludes that an award of \$2,200 in statutory damages
9 is appropriate.

10 **b. Enhanced Damages**

11 Section 605 gives discretion to a district court to award up to \$100,000 in enhanced
12 damages to an aggrieved party where "the violation was committed willfully and for the purposes
13 of direct or indirect commercial advantage or private financial gain[.]" 47 U.S.C.
14 § 605(e)(3)(C)(ii).

15 Here, J&J Sports requests \$100,000 in enhanced damages, the maximum award possible,⁴
16 on the basis that a modest award of damages would not satisfy the purpose of the Federal
17 Communications Act, which is to deter piracy. This argument would apply to *any* violation of the
18 statute, gives the Court no guidance as to how to exercise its discretion, and is not deserving of
19 serious consideration. Focusing on the specific facts of this case, imposition of the maximum
20 penalty seems particularly inappropriate, given that courts in this district typically award enhanced
21 damages of \$5,000 or less where the number of patrons present was modest and the patrons paid a
22 cover charge. See, e.g. Garden City Boxing Club, Inc. v. Lan Thu Tran, Case No. 05-cv-05017
23 RMW, 2006 WL 2691431, at *2 (N.D. Cal. Sept. 20, 2006) (awarding \$1,000 in statutory
24 damages and \$5,000 in enhancement damages when 40 persons were present at the establishment
25 and patrons were charged a \$10 cover charge); Entertainment by J&J, Inc. v. Montecinos, Case
26 No. 01-cv-4242, 2002 WL 1735384, at *1 (N.D. Cal. July 25, 2002) (awarding \$1,000 in statutory
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⁴ See footnote 2, *supra*.

1 damages and \$5,000 in enhancement damages when 35 persons were present at the establishment
2 and patrons were charged a \$10 cover charge).

3 The Court concludes that an award of \$2,200 in enhanced damages is appropriate in light
4 of the previously-described facts.

5 **B. Conversion**

6 **1. Liability**

7 “In California, conversion has three elements: ownership or right to possession of property,
8 wrongful disposition of the property right and damages.” G.S. Rasmussen & Associates, Inc. v.
9 Kalitta Flying Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992) (citation omitted). Although
10 conversion typically involves tangible property, courts in this district routinely apply the law of
11 conversion to the wrongful disposition of intangible property such as the Program at issue in this
12 case. See, e.g., J&J Sports Prods. v. Coyne, 857 F. Supp. 2d 909, 918 (N.D. Cal. 2012) (granting
13 summary judgment on conversion claim against a defendant who intercepted and exhibited a
14 televised boxing match without paying a licensing fee).

15 Here, the undisputed facts show that J&J Sports owned the exclusive commercial
16 distribution rights to the Program and that Parayno’s unauthorized interception of the Program
17 wrongfully disposed J&J Sports of its right to distribute the Program and caused J&J Sports to
18 lose the profit it would have made from licensing the Program. Gagliardi Decl. ¶¶ 1-5; RFA at 1-
19 5, Riley Decl., Ex. A. Because these undisputed facts are sufficient to entitle J&J Sports to a
20 directed verdict at trial, J&J Sports’ motion for summary judgment on its conversion claim is
21 GRANTED.

22 **2. Damages**

23 A plaintiff asserting a claim for conversion may recover either the value of the property at
24 the time of the conversion or an amount sufficient to indemnify the plaintiff for losses that were
25 proximately caused by the conversion. See Cal. Civ. Code § 3336; see also Coyne, 857 F. Supp.
26 2d at 919 (“Damages for conversion are based on the value of the property at the time of the
27 conversion”) (citation omitted).

1 Here, J&J Sports has submitted evidence showing that the cost of a license to exhibit the
2 Program at the establishment would have been \$2,200. Gagliardi Decl. ¶ 8. The Court concludes
3 that the award of \$2,200 in statutory damages, *supra*, makes J&J Sports whole for the injury
4 suffered by Parayno's conversion, and that the award of separate damages for conversion would
5 lead to duplicative recovery.

C. Attorney's Fees

7 Section provides that a district court “shall direct the recovery of full costs, including
8 awarding reasonable attorney’s fees to an aggrieved party who prevails.” 47 U.S.C. §
9 605(e)(3)(B)(iii).

10 J&J Sports moves for leave to file a motion for attorney's fees within fourteen days of the
11 date on which the Court enters judgment. Given that the Court has granted summary judgment to
12 J&J Sports on its Section 605 claim, and that an award of attorney's fees to a prevailing party
13 under Section 506 is mandatory, J&J Sports' request is GRANTED.

IV. CONCLUSION

15 J&J Sports' motion for summary judgment is GRANTED with respect to its claim under
16 47 U.S.C. § 605 and its conversion claim under California law. The Court awards J&J Sports
17 \$2,200 in statutory damages and \$2,200 in enhanced damages under Section 605, for a total of
18 \$4,400. J&J Sports shall file a proposed judgment within three days of the date this order is filed.
19 J&J Sports may file a motion for attorney's fees within fourteen days of the date judgment is
20 entered.

IT IS SO ORDERED.

22 || Dated: October 28, 2013



JON S. TIGAR
United States District Judge